Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BOBBY L. KNOX,
Sergeant, United States Air Force,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether the trial judge erred to the substantial prejudice of petitioner when he refused to allow petitioner to testify about the prosecutrix's sexual promiscuity in support of his defense of consent, in violation of the Fifth Amendment of the United States Constitution?

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BOBBY L. KNOX,
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v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Bobby L. Knox, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 29 September 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, *United States v. Knox*, —— M.J. —— (C.M.A. 1994) [hereinafter cited as *Knox II*] is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, *United States v. Knox* (unpub. A.F.C.M.R. April 20, 1992), *aff'd*, —— M.J.

—— (C.M.A. 1994) [hereinafter cited as *Knox I*] is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 29 September 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1259(3) (West 1993) and 10 U.S.C.A. Section 867a (West Supp. 1994).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law".

STATEMENT OF THE CASE

At a general court-martial composed of officer and enlisted members petitioner was charged with rape (in violation of U.C.M.J. (Uniform Code of Military Justice) Article 120) and conspiracy to rape (in violation of U.C.M.J. Article 81). Petitioner pleaded not guilty to the charges.

Petitioner, SrA (Senior Airman) Theresa Hall, and Sgt (Sergeant) Lu Castonguay worked in the same unit at Kadena AB, Japan. SrA Hall and Sgt Castonguay were romantically and sexually involved. SrA Hall and petitioner were friends and confidants. *See* R. 121. On Friday 28 April 1989 petitioner was scheduled to depart for the Philippines for temporary duty. However, his departure was delayed until the next day and petitioner returned to his dormitory at about 4:00 p.m. At approximately the same time, several members of petitioner's work unit had gathered outside of SrA Hall's dormitory to celebrate the end of the work week and a successful inspection. Many of the attendees were drinking, and people flowed in and out of the party.

Because petitioner was a Bay Chief in the dormitory he was entitled to two rooms without a roommate. *See* R. 391. He had arranged his suite so that one room served as a living room and the other as a bedroom. Two twin size beds were moved into the bedroom and pushed together. Because petitioner believed he would be en route to the Philippines, he had earlier agreed to let Sgt Castonguay and SrA Hall spend the night in his room.

After the party broke up, SrA Hall and Sgt Castonguay returned with petitioner to petitioner's room. *See* R. 405. SrA Hall, Sgt Castonguay, and petitioner watched television, listened to music, had visitors, and drank more beer. Petitioner went to the rest room down the hall several times. During one of these trips down the hall, Sgt Castonguay locked the appellant out of his own room. *See* R. 132, 411. Petitioner believed that Sgt Castonguay and SrA Hall had decided they would spend the night in petitioner's room and that they were ready to go to bed. *See* R. 413.

Petitioner agreed to spend the night in SrA Hall's room in another dormitory, but later decided that staying in her room was not a good idea—he did not want to be seen leaving a female dormitory the next morning, and was concerned about missing his flight to the Philippines. Petitioner returned to the common area of his dormitory and watched television. Petitioner was giving Sgt Castonguay and SrA Hall time to have sex before he returned to the room. *See* R. 414-416.

Petitioner's and prosecutrix's accounts of events essentially concur up to this point in time. A summary of petitioner's version of later events follows: Petitioner testified that he returned to his room later and in the dark saw Sgt Castonguay and SrA Hall naked, with Sgt Castonguay performing cunnilingus on SrA Hall. Petitioner laid down on the other end of the bed facing the wall and fell asleep. *See* R 419. He was awakened, looked up, and saw SrA Hall on all fours at the end of the bed performing fellatio

on Sgt Castonguay. *See* R. 421. SrA Hall then turned her head to see the petitioner. The petitioner interpreted her suggestive looks and motions to mean she wanted him to join them in sex. *See* R. 422. Petitioner got up and stood at the end of the bed. He put his hands on SrA Hall's waist and rubbed his penis against her buttocks. He then put his penis in SrA Hall's vagina and began having intercourse with her. Petitioner decided he should have put on a condom before having intercourse with SrA Hall, so he withdrew his penis from her vagina. SrA Hall reached back for him to encourage him to reenter her vagina. He reinserted his penis in her vagina. *See* R. 425. SrA Hall began to move along with his rhythm. *See* R. 423. Petitioner continued to have intercourse with her for five to seven minutes, then ejaculated while his penis was in her vagina. *See* R. 424. The petitioner then withdrew his penis from her vagina and put on his pants. SrA Hall began to get upset. She looked at petitioner and then at Sgt Castonguay and told Sgt Castonguay to get petitioner out of the room. *See* R. 427-428. SrA Hall began cursing at Sgt Castonguay. Petitioner said words to the effect of "this is fucked up" and "what's the matter with her." Sgt Castonguay told the appellant she would be all right. *See* R. 428.

A summary of SrA Hall's testimony regarding later events follows: After petitioner left his room to go to SrA Hall's room, SrA Hall finished a cigarette, got undressed, and joined Sgt Castonguay on appellant's bed. *See* R. 137. They were lying on top of the comforter engaged in foreplay when SrA Hall fell asleep. *See* R. 138. She did not remember having sexual intercourse with Sgt Castonguay and stated that if they had engaged in sexual intercourse, she would have remembered it. *See* R. 139, 163. (This testimony contradicted a written statement that SrA Hall gave to the Air Force Office of Special Investigations in which she stated she had consensual sex with Sgt Castonguay that night. *See* R. 166).

The next thing SrA Hall remembered was being awake, lying on her stomach, with a comforter over her head and someone having sexual intercourse with her, entering her vagina from behind. *See* R. 139, 172. As she was waking up, she moved her hips in sync with a rhythmic motion for five to ten seconds. She then realized someone was sitting next to her on the bed with his hands on her shoulder. She looked through a hole in the comforter and saw petitioner having sex with her and Sgt Castonguay sitting next to her on the bed. *See* R. 140. She said "Lu, get him the hell out of here." R. 146. She felt petitioner withdraw his penis and jump off the bed. She said petitioner sounded "surprised" (R. 177) and said "Lu, we fucked up," "Lu, I didn't know that she didn't know" and "Lu, we're in trouble". R. 146. Sgt Castonguay said, "It's okay Bobby, she'll be okay in a minute." R. 146. SrA Hall then went back and forth between dormitory buildings talking to people she knew and ended up sitting on the stairs outside her dormitory talking to the appellant and Sgt Castonguay. Petitioner and Sgt Castonguay apologized to her because she was upset about the situation. SrA Hall got upset with Sgt Castonguay because he would not talk to her. *See* R. 190. About 4:00 a.m. on 29 April 1989 SrA Hall went to bed and slept until about noon. About 3:00 p.m. on 29 April 1989 one of SrA Hall's friends persuaded her to report the incident.

Prior to trial defense counsel informed the court and opposing counsel with notice of, and request to use evidence which might be barred under Military Rule of Evidence 412.[1] The Military Judge postponed ruling until

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[1] Military Rule of Evidence 412 reads, in pertinent part:

(a) Notwithstanding any other provision of these rules of this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a non-

an appropriate time. *See* R. 13. The Military Judge did permit limited questions on cross-examination of SrA Hall

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consensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted;

or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury;

or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

about prior relations between Sgt Castonguay and SrA Hall, but not as to other partners or reputation. *See* R. 195-197, 203-205.

After the prosecution rested, an Article 39(a) session [2] was called to discuss petitioner's request to use opinion evidence in support of a defense of consent. *See* R. 323-381. Petitioner's motion indicated that petitioner believed that the intercourse was consensual, based in part upon his belief and knowledge of SrA Hall's promiscuous and experimental sexual behavior. Petitioner took the stand and testified regarding his knowledge of SrA Hall's reputation and habits prior to the incident on 28 April 1989.

Prior to her arrival at Kadena Air Base, SrA Hall sent a letter to her unit sponsor, enclosing a picture of herself holding a beer and draping her arm over a man in a suggestive manner. *See* R. 330. This picture was apparently posted in the work area with the word "bimbo" written on it. *See id.* After petitioner and SrA Hall became friends, she confided in him regarding her problems and her exploits. *See* R. 341. Petitioner counseled SrA Hall that her sexual proclivities prevented her from having a lasting and fulfilling relationship. Petitioner knew of the affairs SrA Hall had with several men who lived in his dormitory. She was known to have had sex with more than one man in an evening. Petitioner believed that she had sex where others could observe her three to five times. *See* R. 342. SrA Hall had swum nude with several men as the only female present, and allowed herself to be used as a "volleyball". Petitioner knew these facts, and of many other sexual exploits of SrA Hall, prior to 29 April 1989. *See* R. 339-340. Petitioner believed SrA Hall "was basically liberal when it came to having sex. It was nothing to her to have sex whenever,

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[2] U.C.M.J. Article 39(a) sessions are sessions held out of the presence of court members. *See* U.C.M.J. Article 39(a), 10 U.S.C. Section 839(a) (1988).

with whoever and however. Nothing sexual was beyond her." R. 344. Petitioner testified that his opinion regarding SrA Hall's attitude toward sex affected the decision he made about having sex with SrA Hall on 28 April 1989. *See* R. 346. Specifically, petitioner believed that SrA Hall was a willing participant in sexual activity with him on 29 April 1989. *See* R. 347.

Trial defense counsel stated he wanted to address petitioner's defense of mistake of fact. He believed that he could establish petitioner's version of the facts and let the court members decide if his choice to engage in sex based on suggestive looks from SrA Hall constituted a mistake of fact:

> Just because somebody's in your room having sex with their boyfriend, no matter what the look on their face, doesn't mean that it's reasonable for you to go over there and have sex with them. The past background of that person would play an important part on your decision as to whether or not it would be reasonable to have sex and this incident did not fit outside the norm that [petitioner] was used to hearing about with [SrA] Hall.

R. 370. Trial defense counsel indicated that he would be satisfied to discuss what was going through petitioner's mind, but that would mean going into details. *See* R. 375.

The Military Judge denied the motion, indicating that the evidence was not relevant and material to the defense presentation of an affirmative defense:

> The Court finds that neither the individual acts of sexual conduct of Sergeant Hall, nor her reputation, either known or believed by the accused, has any tendency to make the existence of any fact more or less probable than it would without the evidence. . . . Now the Court finds further that the evidence is not material. By the accused's testimony the Court does

> not find any mistake of fact as to her consent being raised, rather Sergeant Knox's testimony represents consensual sex. . . . Consensual intercourse would be an absolute defense to the charges. So the importance of the reasonableness of the accused's alleged mistake of fact is not important and by the testimony of the accused, by the theory that the Court doesn't really find that it would be in dispute.

R. 379-380.

Petitioner was ultimately convicted of both charges and sentenced to a dishonorable discharge, hard labor without confinement for ninety days, and reduction to the lowest enlisted grade. On 30 May 1990 the convening authority approved the sentence as adjudged.

Petitioner appealed to the United States Air Force Court of Military Review. In an unpublished opinion dated 20 April 1992, the court affirmed the findings of guilty and the sentence. *See Knox I* at 8. With regard to the relevant issue, the Court found that the Military Judge's ruling that the proposed "evidence was neither material nor relevant" was correct. *Knox I* at 7. The Court noted "the fact-finders received two distinct, and widely divergent, accounts of the event which posed a factual issue of consent, unfettered by any true possibility of mistake. They resolved this question of fact by believing the victim." *Id.* The Court noted that because one is willing to engage in sex with one person that this does not necessarily mean the desire exists to have sex with another person, at another time, at another place. *See id.* (citing *United States v. Jensen*, 25 M.J. 284, 290 (C.M.A. 1987) (Sullivan, J., dissenting)). The Court held that the Military Judge did not clearly abuse his discretion in excluding the proposed testimony. *Knox I* at 7.

Petitioner appealed the decision of the United States Air Force Court of Military Review to the United States Court of Military Appeals. *See Knox II.* The United

States Court of Military Appeals granted review, essentially, of the question presented here. *See Knox II* at 2. The Court first noted that petitioner's defense did not depend on the question whether petitioner "honestly and reasonably believed" SrA Hall was consenting to sex. *Knox II* at 6. The Court noted "[t]o the extent that the victim's reputation made it more or less likely that she would participate in such a threesome is exactly the kind of evidence that [M.R.E.] 412 proscribes." *Id.* Further, the Court noted that petitioner was not foreclosed from presenting evidence of his experiences with SrA Hall (including sexual banter and watching an adult movie with her), was allowed to testify that SrA Hall indicated that she wanted the petitioner to join in sex with she and Sgt Castonguay, and that he was allowed to present a defense that he "reasonably and honestly thought she had consented to have sex with him." *Id.* The Court stated that petitioner was not denied the opportunity to present his defense. *Id.* The Court stated "[w]e agree with the military judge's ruling that such evidence was not relevant, material, or favorable to the defense.' *Id.* (citation omitted). The Court affirmed the decision of the United States Air Force Court of Military Review.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE UNITED STATES COURT OF MILITARY APPEALS' DECISION IN THIS CASE TO CORRECT THE FUNDAMENTAL UNFAIRNESS OF PETITIONER'S CONVICTION AND TO OUTLINE THE CONSTITUTIONAL LIMITS OF "RAPE SHIELD" STATUTES, WHICH BY THEIR NATURE THREATEN AN ACCUSED'S EXERCISE OF HIS UNITED STATES CONSTITUTION FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

Relevant and material evidence which is favorable to the defense must be admitted. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *United States v. Williams*, 37 M.J. 352, 359 (C.M.A. 1993); *United States v. Dorsey*, 16 M.J. 1, 5 (1983). "The defendant has a constitutional right to present admissible evidence that is probative of his innocence by showing the government's failure to prove the offense charged, by establishing a defense, or by attacking the credibility or fair mindedness of a witness . . . . A defendant's reasonable, albeit mistaken, belief that the victim consented may constitute a defense to rape." *United States v. Saunders*, 943 F.2d 388, 391-392 (4th Cir. 1991). Evidence offered for "the express purpose of demonstrating a mistaken belief on appellant's part that the prosecutrix had given her consent" may be admissible. *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983) (Everett, C.J., concurring). *See also United States v. Jensen*, 25 M.J. 284, 287 (C.M.A. 1987) (rape conviction reversed where evidence on the issue of consent was excluded by M.R.E. 412).

United States v. Kelly, 33 M.J. 878 (A.C.M.R. 1991) is on point for the relevant issue with the case at bar. In *Kelly*, appellant had observed and been the object of the prosecutrix's "sexually provocative, flirtatious manner." *Id.* at 879. Kelly testified that he went to the prosecutrix's room; she woke from a drunken sleep, kissed him, helped him remove their clothing, and had consens-

ual sex with him in several positions. *Id.* at 880. Kelly then left. *Id.* The prosecutrix testified that she passed out and was awakened by a penis inside her. She passed out again and observed someone leave as she woke. *Id.* at 881. The Military Judge excluded evidence relevant to the question whether the prosecutrix consented. *Id.* at 879. The Military Judge also excluded evidence relevant to appellant's mistaken perception that the prosecutrix was willing to engage in sex with him. *Id.*

The United States Army Court of Military Review held "[t]he evidence tended to show that [the prosecutrix] was engaged in a pattern of behavior rather than unrelated incidents." *Id.* at 882 (citation omitted). The court also held the acts were "public" in nature. *Id.* at 883. Therefore, such evidence was probative of appellant's state of mind and less entitled to protection under M.R.E. 412:

> [T]he public behavior of a prosecutrix is significant in weighing the probative value of particular evidence against the prejudice to her privacy or to rational decision making by the jury. *State v. Colbath*, 130 N.H. 316, 540 A.2d 1212 (1988).
>
> We agree with [then] Judge Souter that evidence describing the prosecutrix's open, sexually suggestive conduct in the presence of the public has far less potential for damaging her reputation than would revelation of what she may have done behind a closed door. Evidence of public displays of general interest in sexual activity can be taken to indicate a receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners. (Citations omitted).

Id. at 883.

The defense presented alternate theories at trial. Either SrA Hall was awake and consented to the sexual intercourse with petitioner, or SrA Hall was asleep and her physical responses as well as petitioner's knowledge of her sexual proclivities led him to believe she was con-

senting (i.e. mistake of fact). The prior sexual acts evidence was only relevant to the mistake of fact defense. Since rape is a general intent crime, in order for a mistake of fact defense to be successful, the mistake must be both honest and reasonable. During argument on findings, trial counsel conceded petitioner's mistake was honest. *See* R. 809. However, he argued that his mistake was not reasonable.

Dr. (Lt Colonel) Trichnopoly Narayanaswamy, neurologist and sleep disorder expert, testified there are several stages of sleep and sometimes people can perform functions while asleep. Although it is impossible to establish that SrA Hall engaged in sex with petitioner while she was asleep, it was possible, according to expert testimony. *See* R. 556. The Military Judge based his ruling on his belief that the proffered evidence was not relevant nor material. However, the Military Judge did not understand how this evidence was important to petitioner's defense of mistake of fact, as indicated by his findings of fact. The Military Judge failed to understand that petitioner's belief that SrA Hall consented to sex with him was tied to his knowledge of her prior sexual behavior. The proffered evidence was clearly relevant for this purpose. *See United States v. Saunders,* 943 F.2d 388, 392 (4th Cir. 1991); *United States v. Jensen,* 25 M.J. 284, 287 (C.M.A. 1987); *Doe v. United States,* 666 F.2d 43, 48 (1981).

The evidence petitioner sought to present must be material as well as relevant. As trial defense counsel asserted, absent the excluded evidence, most reasonable people would find petitioner's choice to join in sexual activity, under the circumstances, unreasonable. Exclusion of the proffered evidence effectively deprived petitioner of his opportunity to present the affirmative defense. "Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice . . . .' A violation of

these provisions requires some showing that the evidence lost would be both material and favorable to the defense." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872-873 (1982). The excluded evidence was essential to petitioner's mistake of fact defense in this case and was clearly material.

CONCLUSION

The Military Judge's exclusion of the proffered evidence of prosecutrix's sexual promiscuity, which was essential to petitioner's mistake of fact defense, deprived petitioner of his right to due process of law under the United States Constitution Fifth Amendment and resulted in a fundamentally unfair trial. "Rape shield laws", which are common in many jurisdictions, raise important issues impacting United States Constitution Fifth Amendment rights. This Court should grant review of this case to redress the fundamental unfairness of petitioner's conviction and to define the parameters of permissible rape shield statutes.

Respectfully submitted,

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December 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0341
CMR No. 28628

UNITED STATES,
Appellee

v.

BOBBY L. KNOX,
Sergeant, U.S. Air Force,
Appellant

Submitted February 23, 1994

Decided Sep. 29, 1994

For Appellant: *Colonel Jay L. Cohen* and *Captain Robert A. Parks* (on brief); *Colonel Terry J. Woodhouse.*

For Appellee: *Colonel Jeffrey T. Infelise* and *Major Barnard N. Madsen* (on brief).

Military Judge: James C. Heupel

PER CURIAM:

Contrary to his pleas, appellant was convicted, by a general court-martial composed of officer and enlisted members, of rape and conspiracy to commit rape, in violation of Articles 120 and 81, Uniform Code of Military Justice, 10 USC §§ 920 and 881, respectively. He was sentenced to a dishonorable discharge, hard labor without confinement for 90 days, and reduction to the

lowest enlisted pay grade. The convening authority approved the sentence, and the Court of Military Review affirmed. This Court granted review of whether the military judge erred in refusing to allow appellant to testify about the victim's prior sexual acts and her promiscuity to support his claim that she consented to sexual intercourse or to support his defense of mistake-of-fact as to her consent.

Based upon our review of the record and the briefs of the parties, we conclude that the military judge properly excluded the proffered evidence.

The facts as stated by the Court of Military Review are as follows:

> The appellant, the prosecutrix, Theresa, and Sergeant "Lu" Castonguay worked in the same shop at Kadena Air Base, Japan. Theresa and Castonguay were intimately involved and engaged in sexual relations on a regular basis. The appellant and Castonguay were close friends and confidants.
>
> On 28 April 1989, a Friday, the appellant was scheduled to go to the Philippines. The same date members of his shop gathered outside Theresa's dormitory to celebrate the end of the week and a favorable dorm inspection. After drinking three or so beers, Theresa went to her room for a shower. This occurred about 1990. After her shower, the appellant invited her and Castonguay to his room. While she was there and sitting on . . . Castonguay's lap, the appellant kept running his hands up and down her legs. She told him to "knock it off." By then she was sipping on her sixth beer.
>
> Co-workers of the appellant testified that he was in the habit of making crude, sexually explicit remarks to Theresa. The appellant either denied mak-

ing the remarks or contended they were said in jest. Castonguay was also heard to say that since he was not "[sexually] satisfying Theresa, he was going to get [the appellant] to f[- - -] her."

About 2245 or so, the appellant left the room, and "Lu" joked about locking him out of his room. Later, when the appellant returned, "Lu" picked Theresa up and carried her to the bed. He took off his clothes and began "rolling around . . . hugging and kissing" Theresa, who was still dressed. When Theresa looked up and saw the appellant standing by the bed, she jumped up and left for the bathroom. Apparently, the appellant was concerned about where he was going to stay for the night since his bed appeared to be occupied. Theresa said he could stay in her room. This appeared to satisfy the appellant because he left. Theresa sat on the bed, undressed, rolled over next to Castonguay and began "hugging and kissing" him. She then rolled on her back and Castonguay rolled on top of her. That's the last thing she remembered as she fell asleep. She does not remember having sex with Castonguay that evening, and she thinks she would have remembered if she had.

When she awoke, she was on her stomach, and someone was having sexual intercourse with her. There was a comforter over her head, and "some hands were on [her] back." In the process of waking up, she assumed her partner was Castonguay and responded for "5 or 10 seconds." Later, she thought "there was something funny going on," and looked over her shoulder and saw the appellant "having sex with [her]." She started crying and said, "Lu, get him the hell out of here." The appellant withdrew from her and jumped off the bed. As he

jumped off, he said, "Lu, we f[- - -]ed up" and "Lu, we're in trouble," and "Lu, I didn't know that she didn't know." She heard Castonguay say, "It's okay, Bobby, she'll be okay in a minute." She screamed for both of them to leave the room so she could get dressed which they did. Later, the appellant approached Theresa and said, "we're really sorry; we're really sorry and we feel so bad about this; we discussed it and we're ready to face the consequences for what we did." She subsequently called the Rape Intervention Crisis Center at the Kadena Clinic. She said she did not consent to having sexual intercourse with the appellant.

Theresa's and the appellant's testimony are essentially in agreement as to what happened up to the point where the appelant left to stay in her room so she and Castonguay could continue their romantic interlude. It is here that the two versions of the event part company. The appellant testified that when he returned to his room a second time, Theresa and Castongay were naked and he was performing cunnilingus on her. [Appellant] stated he laid down on the other end of the bed and went to sleep. When he awoke sometime later, Theresa was on all fours at the end of the bed performing fellatio on Castonguay. Theresa looked at him and he interpreted her "suggestive looks and motions" as an invitation to join the sexual encounter. He did so and had sexual intercourse with her for "5 to 7" minutes, achieving a climax. When he withdrew from her midway in the session, she encouraged him to continue. He said that while Theresa made no noise during the episode, she was awake and not asleep.

Shortly thereafter, the appellant told the court that Theresa became upset and told Castonguay "[t]o get [the appellant] the hell out of there." The appellant

indicated that this behavior was not unusual for Theresa as she would occasionally go "spastic like" and start "cussing" at other people. He denied saying, "Lu, we f[- - -]ed up," "Lu, we're in trouble," and "Lu, I didn't know that she didn't know." He also denied saying, "We're ready to turn ourselves in and face the consequences." He admitted that he and Castonguay has spoken with Theresa in an attempt to find out "what her problem was[.]" It was during this conversation that he said Theresa remarked, "I bet you've done this with other girls." The appellant maintained that Theresa consented to the sexual encounter and that he and Castonguay had no agreement to engage her in sexual relations.

The defense offered expert testimony that certain sleep disorders could make it possible for Theresa to have awakened and consented to sexual intercourse and not remember it. It was also possible for the appellant, who had just awakened, to have sexual relations and not remember all of what had taken place. However, the existence of a sleep disorder does not explain the two diametrically opposed versions of what happened.

Additionally, the defense tendered expert testimony that the alleged victim did not have a post-traumatic stress disorder as the result of the events taking place on 28-29 April 1989. The defense also offered evidence of Theresa's reputation for not telling the truth, and the appellant's reputation for truthfulness.

In rebuttal, the government established that the next morning, Theresa, upset and crying, told a male friend what had happened. She told him she passed out in the appellant's room with Castonguay and when she awoke the appellant was on top of her. She said that when she became awake, he got off

and started apologizing. Finally, the government offered expert testimony that Theresa did exhibit symptoms of a post-traumatic stress disorder.

* * *

At trial the appellant served notice under Mil.R. Evid. 412(c)(1) that he intended to "offer evidence of specific incident and reputation evidence of the [prosecutrix's] past sexual behavior." The appellant claims "he thought [the prosecutrix] was awake and by her actions was consenting to his advances." Thus, evidence as to his *state of mind* was constitutionally required.

In his offer of proof under Mil.R.Evid. 412(c)(2), the appellant stated he would testify that the prosecutrix had the reputation of being a "bimbo" who liked to "party," was sexually promiscuous, and "very easy;" he had also been told that she had taken "her top off" in a downtown bar; several co-workers had stated to him that they had contacted [sic] a sexually transmitted disease from her in the fall of 1988; and that in July 1988, at a beach party, she engaged in various sex acts in the presence of others—the appellant was not at the party, but was told about the incident.

Unpub. op. at 1-4, 6 (AFCMR April 20, 1992).

Mil.R.Evid. 412(a), Manual for Courts-Martial, United States, 1984, prohibits admission "in a case in which a person is accused of a nonconsensual sexual offense, [of] reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense. . . ." Mil.R.Evid. 412(b)(1) prohibits admission "in a case in which a person is accused of a nonconsensual sexual offense, [of] evidence of a victim's past sexual behavior other than reputation or opinion evidence. . ." unless such evidence is "constitutionally required to be admitted." We have recognized that admission of such evidence is constitutionally required if it is relevant. *United States v.*

Greaves, No. 93-0203, —— MJ —— (CMA Sep. 22, 1994).

On appeal, appellant contends the military judge erred in excluding evidence of Theresa's promiscuous nature. He contends such evidence was both relevant and material to the issue of Theresa's consent and appellant's reasonable belief the prosecutrix was consenting. We disagree for two reasons. First and foremost, appellant's defense at trial did not turn upon whether appellant honestly and reasonably believed that the victim was consenting to his sexual acts, but rather he testified that he was invited to join an on-going sexual event. To the extent that the victim's reputation made it more or less likely that she would participate in such a threesome is exactly the kind of evidence that Mil.R.Evid. 412 proscribes.

Secondly, appellant was allowed to present evidence of his own experiences with Theresa. In particular, he was permitted to testify about the sexual banter he and Theresa engaged in, as well as one occasion when he and Theresa watched an adult movie together.

Appellant was not denied the opportunity: (1) to testify that the prosecutrix motioned for him to join in her sexual encounter with "Lu"; or (2) to present [a] defense that he reasonably and honestly thought she had consented to have sex with him.

The issues in controversy in this case are whether the sexual adventure took place as described by appellant or as described by the victim; whether she was asleep or awake; whether she invited appellant into the situation; or whether he raped her while she slept. Appellant was not denied the opportunity to fully present his defense. We agree with the military judge's ruling that such evidence was not relevant, material, or favorable to the defense. *United States v. Greaves, supra.*

The decision of the United States Air Force Court of Military Review is affirmed.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

SERGEANT BOBBY L. KNOX, FR076-56-4975
UNITED STATES AIR FORCE

ACM 28628

20 April 1992

Sentence adjudged 21 October 1989 by GCM convened at Kadena Air Base, Japan. Military Judge: James C. Heupel.

Approved sentence: Dishonorable discharge, hard labor without confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair, Colonel Jeffrey R. Owens, Major Ronald G. Morgan, and Captain Darla G. Orndorff.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis and Major Paul H. Blackwell, Jr.

Before

HODGSON, McLAUGHLIN, and JAMES
Appellate Military Judges

OPINION OF THE COURT

HODGSON, Senior Judge:

This is a companion case to *United States v. Castonguay*, ACM 28758, 27 February 1992. In separate trials, the appellant and Sergean Lucien Castonguay, were each convicted of rape and conspiring to commit rape. The appellant was sentenced to a dishonorable discharge, 90 days hard labor without confinement, and reduction to E-1. The convening authority approved the sentence as adjudged. We find no prejudicial error and affirm.

FACTS

The appellant, the prosecutrix, Theresa, and Sergeant "Lu" Castonguay worked in the same shop at Kadena Air Base, Japan. Theresa and Castonguay were intimately involved and engaged in sexual relations on a regular basis. The appellant and Castonguay were close friends and confidants.

On 28 April 1989, a Friday, the appellant was scheduled to go TDY to the Philippines. That same date members of his shop gathered outside Theresa's dormitory to celebrate the end of the week and a favorable dorm inspection. After drinking three or so beers, Theresa went to her room for a shower. This occurred about 1900. After her shower, the appellant invited her and Castonguay to his room. While she was there and sitting on the Castonguay's lap, the appellant kept running his hands up and down her legs. She told him to "knock it off." By then she was sipping on her sixth beer.

Co-workers of the appellant testified that he was in the habit of making crude, sexually explicit remarks to Theresa. The appellant either denied making the remarks or contended they were said in jest. Castonguay was also heard to say that since he was not "[sexually] satisfying Theresa, he was going to get [the appellant] to fuck her."

About 2245 or so, the appellant left the room, and "Lu" joked about locking him out of his room. Later, when the appellant returned, "Lu" picked Theresa up and car-

ried her to the bed. He took off his clothes and began "rolling around . . . hugging and kissing" Theresa, who was still dressed. When Theresa looked up and saw the appellant standing by the bed, she jumped up and left for the bathroom. Apparently, the appellant was concerned about where he was going to stay for the night since his bed appeared to be occupied. Theresa said he could stay in her room. This appeared to satisfy the appellant because he left. Theresa sat on the bed, undressed, rolled over next to Castonguay and began "hugging and kissing" him. She then rolled on her back and Castonguay rolled on top of her. That's the last thing she remembered as she fell asleep. She does not remember having sex with Castonguay that evening, and she thinks she would have remembered if she had.

When she awoke she was on her stomach, and someone was having sexual intercourse with her. There was a comforter over her head, and "some hands were on [her] back." In the process of waking up, she assumed her partner was Castonguay and responded for "5 to 10 seconds." Later, she thought "there was something funny going on," and looked over her shoulder and saw the appellant "having sex with [her]." She started crying and said, "Lu, get him the hell out of here." The appellant withdrew from her and jumped off the bed. As he jumped off, he said, "Lu, we fucked up" and "Lu, we're in trouble," and "Lu, I didn't know that she didn't know." She heard Castonguay say," It's okay, Bobby, she'll be okay in a minute." She screamed for both of them to leave the room so she could get dressed which they did. Later, the appellant approached Theresa and said, "we're really sorry; we're really sorry and we feel so bad about this; we discussed it and we're ready to face the consequences for what we did." She subsequently called the Rape Intervention Crisis Center at the Kadena Clinic. She said she did not consent to having sexual intercourse with the appellant.

Theresa's and the appellant's testimony are essentially in agreement as to what happened up to the point where the appellant left to stay in her room so she and Castonguay could continue their romantic interlude. It is here that the two versions of the event part company. The appellant testified that when he returned to his room a second time, Theresa and Castonguay were naked and he was performing cunnilingus on her. He stated he laid down on the other end of the bed and went to sleep. When he awoke sometime later, Theresa was on all fours at the end of the bed performing fellatio on Castonguay. Thereasa looked at him and he interpreted her "suggestive looks and motions" as an invitation to join the sexual encounter. He did so and had sexual intercourse with her for "5 to 7" minutes, achieving a climax. When he withdrew from her midway in the session, she encouraged him to continue. He said that while Theresa made no noise during the episode, she was awake and not asleep.

Shortly thereafter, the appellant told the court that Theresa became upset and told Castonguay, "To get [the appellant] the hell out of there." The appellant indicated that this behavior was not unusual for Theresa as she would occasionally go "spastic like" and start "cussing" at other people. He denied saying, "Lu, we fucked up," "Lu, we're in trouble," and "Lu, I didn't know that she didn't know." He also denied saying, "We're ready to turn ourselves in and face the consequences." He admitted that he and Castonguay had spoken with Theresa in an attempt to find out "what her problem was?" It was during this conversation that he said Theresa remarked, "I bet you've done this with other girls." The appellant maintained that Theresa consented to the sexual encounter and that he and Castonguay had no agreement to engage her in sexual relations.

The defense offered expert testimony that certain sleep disorders could make it possible for Theresa to have awakened and consented to sexual intercourse and not

remember it. It was also possible for the appellant, who had just awakened, to have sexual relations and not remember all of what had taken place. However, the existence of a sleep disorder does not explain the two diametrically opposed versions of what happened.

Additionally, the defense tendered expert testimony that the alleged victim did not have a post traumatic stress disorder as the result of the events taking place on 28-29 April 1989. The defense also offered evidence of Theresa's reputation for not telling the truth, and the appellant's reputation for truthfulness.

In rebuttal, the government established that the next morning, Theresa, upset and crying, told a male friend what had happened. She told him she passed out in the appellant's room with Castonguay and when she awoke the appellant was on top of her. She said that when she became awake, he got off and started apologizing. Finally, the government offered expert testimony that Theresa did exhibit symptoms of a post traumatic stress disorder.

SUFFICIENCY OF THE EVIDENCE

As an intermediate appellate court we have "awesome, plenary, *de novo* power of review" that allows us to substitute our judgement for that of the court members. *See United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). However, this prerogative is not without its limits for we must first recognize that the trial court *saw and heard* the witnesses when they initially determined controverted questions of fact. Article 66(c), UCMJ.

Appellant defense counsel urge that we hold that the evidence is factually insufficient to sustain a conviction for rape and conspiracy to commit rape, or in the alternative, that we invoke this "*de novo* power of review" and set aside the appellant's conviction for each offense.

In testing for the factual sufficiency of the evidence we must weigh the evidence of record, making allowance for

not having seen and heard the witnesses and determine for ourselves, whether the accused is guilty of the offense alleged. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Here, the issue before the court members was clear and succinct: Which version of the events of 28 April was to be believed—Theresa's or the appellant's? In his opening statement, the trial defense counsel concisely identified the paramount matter to be settled when he observed: "[The] issue you decide is was [Theresa] awake [when the sexual intercourse occurred] and is making up a story or was she not awake?" Thus, the credibility of each participant is the crucial factor.

Theresa's version of what happened cannot be reconciled with the appellant's. She testified that she passed out on a bed with her boyfriend, and when she awoke her boyfriend had his hands on her shoulders and the appellant was having sexual intercourse with her. She said she did not consent to this. She further stated that the appellant's reaction to her anger over what had happened was one of concern and fear for what might happen to him as a result of the incident. Additionally, Theresa testified that both the appellant and Castonguay expressed remorse for what they had done and were willing to accept the consequences for their actions. That Theresa reported what had happened shortly after it occurred is corroboration that the members could consider in assessing her credibility. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989), *aff'd* 31 M.J. 150 (C.M.A 1990)

The appellant, on the other hand, maintained that Theresa was awake and freely consented to having sexual relations with him in a group setting. He denied the remarks attributed to him by Theresa suggesting that he was at fault over what had occurred. He did, however, acknowledge that Theresa had angrily confronted him with the accusation, "I bet you've done this with other girls." This part of appellant's testimony tends to support Theresa's claim that the sexual intercourse was non-

consensual—had she consented there would no reason to reproach him for his conduct.

Appellate defense counsel also suggest that the lenient sentence, which included no confinement, is inconsistent with guilt—that the court members must have levied the light sentence because they had a doubt that the appellant was guilty of rape. We see no merit in this claim. Just as a lengthy period of confinement is not proof of guilt, neither is lack of the confinement consistent with innocence.

Although Sergeant Castonguay did not testify at the appellant's trial, relying on his right against self-incrimination, appellate defense counsel urge that we consider an affidavit summarizing Castonguay's testimony at his own trial on the issue of the sufficiency of evidence in the appellant's court-martial. We decline to do so as a post-trial affidavit cannot be used by this Court to support or reverse a conviction. *See United States v. Swanson,* 9 U.S.C.M.A. 711, 26 C.M.R. 491 (1958); *see also United States v Ferguson,* 5 U.S.C.M.A. 58, 17 C.M.R. 28 (1954).

The appellant also argues that the evidence does not support a conspiracy between himself and Castonguay to rape Theresa as there was no agreement to accomplish this. An "agreement in a conspiracy need not manifest itself in any formal words," and the conduct of the parties may be sufficient to show that an agreement existed. *United States v. Layne,* 29 M.J. 48 (C.M.A. 1989). The record established that the appellant and Sergeant Castonguay were close friends. Castonguay was heard to say that since "he was not [sexually] satisfying Theresa, he was going to get [the appellant] to fuck her." The appellant had earlier told co-workers that he was sexually attracted to Theresa. He denied either saying the remarks attributed to him or maintained they were said in jest. In

either situation, this was a factual determination for the members. Castonguay's conduct in placing his hands on Theresa's shoulders is an indication that the two of them were acting in concert. The same is true of Castonguay's attempt to calm Theresa so that perhaps the incident would go unreported. Finally, the appellant's assurance to Theresa that *"we're really sorry and we feel so bad about this"* is further evidence of concerted action to accomplish a criminal act. Thus, we conclude that a violation of Article 81, UCMJ, was established. *United States v. Layne, supra.*

Proof beyond a reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rodriguez, supra*; *United States v. Elmore,* 31 M.J. 678 (N.M.C.M.R. 1990). This was a vigorously fought trial. Both sides contested every point. The members were properly instructed, and returned a verdict that established they believed the prosecutrix and not the appellant. The evidence supports their conclusion. We have examined the record of trial, and like the court below, we are convinced beyond a reasonable doubt that the appellant is guilty of the offenses charged. *United States v. Lips,* 22 M.J. 679 (A.F.C.M.R. 1986), *pet. denied,* 24 M.J. 45 (C.M.A. 1987).

MIL. R. EVID. 412

Mil. R. Evid. 412 is intended to protect victims of sexual assaults from embarrassing and degrading cross-examination and evidence presentations that are common to the prosecution of such offenses. Yet, this rule of evidence is not an absolute bar to offering evidence relating to the purported victim's past sexual experience if it is relevant and "constitutionally required." *United States v. Hurst,* 29 M.J. 477 (C.M.A. 1990).

At trial the appellant served notice under Mil. R. Evid. 412(c)(1) that he intended to "offer evidence of specific

incident and reputation evidence of the [prosecutrix's] past sexual behavior." The appellant claims "he thought [the prosecutrix] was awake and by her actions was consenting to his advances." Thus, evidence as to his *state of mind* was constitutionally required.

In his offer of proof under Mil. R. Evid. 412(c), the appellant stated he would testify that the prosecutrix had the reputation of being a "bimbo" who liked to "party," was sexually promiscuous, and "very easy;" he had also been told that she had taken "her top off" in a downtown bar; several co-workers had stated to him that they had contacted a sexually transmitted disease from her in the fall of 1988; and that in July 1988, at a beach party, she engaged in various sex acts in the presence of others—the appellant was not at the party, but was told about the incident.

The trial judge admitted some portions of the appellant's proposed testimony, but excluded any reference to individual acts of sexual conduct by the prosecutrix. He concluded that neither those individuals acts nor her reputation, either known or believed by the appellant, had any tendency to make the existence of any fact more or less probable than it would without the evidence. He specifically noted that none of the sexual incidents by the prosecutrix involved the appellant, and the circumstances were not similar to her or the appellant's version of the events which led to the rape charge. *See United States v. Pickens*, 17 M.J. 391 (C.M.A. 1984).

The trial judge further held that the rejected evidence was neither material nor relevant. We find no fault with that ruling. The key issue in this case is clear-cut: the prosecutrix testified she was asleep when the appellant had sexual intercourse with her and the appellant maintained she was a wide-awake, consenting partner in the encounter. The fact-finders received two distinct, and widely

divergent, accounts of the event which posed a factual issue of consent, unfettered by any true possibility of mistake. They resolved this question of fact by believing the victim.

The appellant sought to do what Mil. R. Evid. 412 seeks to prevent: portray an alleged rape victim as a bad person who got no more than she deserved. A rational inference does not arise from the willingness to engage in sex with one person that this willingness exists with respect to a different person at a different time in a different place. *United States v. Jensen,* 25 M.J. 284, 290 (C.M.A. 1987) (Sullivan J., dissenting). We find no clear abuse of discretion in the trial judge's ruling excluding the identified portions of the appellant's proffered testimony. *United States v. Hurst, supra.*

INADEQUATE REPRESENTATION

Appellate defense counsel argue that the appellant's trial defense counsel was ineffective because he failed to seek a grant of immunity for Sergeant Castonguay so that he could be interviewed and testify at the appellant's trial.

We have said it many times but it bears repeating—individuals convicted of crimes tend to blame their lawyers rather than themselves for their misfortune. To counter this human failing, the law presumes that counsel are effective and act only in their client's best interests. To rebut this presumption, one who maintains he was not adequately represented must identify specific conduct which is unreasonable under acceptable professional standards. *United States v. Barnard,* 32 M.J. 530 (A.F.C.M.R. 1990) *pet. denied,* 33 M.J. 484 (C.M A. 1991); *United States v. Washington,* 29 M.J. 536 (A.F.C.M.R. 1989), *pet. denied,* 30 M.J. 38 (C.M A. 1990).

We have examined the appellant's complaint in conjunction with an affidavit from his trial defense counsel.

See United States v. Mays, 33 M.J. 455 (C.M.A. 1991). This affidavit provides a logical and professionally sound explanation as to why the appellant's trial lawyer thought it was not in his client's best interest to use Castonguay's "self-serving, exculpatory version of the facts." We consider the appellant's assertion of ineffective assistance of counsel to be devoid of merit and unfounded.

INVITED ISSUE

This assigned error is resolved adversely to the appellant.

For the reasons stated, the findings of guilty and the sentence are

AFFIRMED.

Judges McLAUTHLIN and JAMES concur.

[SEAL]

OFFICIAL

/s/ Laura L. Green
LAURA L. GREEN
Clerk of Court
Court of Military Review

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